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No. 84-1098

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

GENERAL MOTORS CORPORATION,
Petitioner,
v.
LEE M. THOMAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business organizations and individuals in the United States. The Chamber's current membership exceeds 184,000, including over 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and local and state chambers of commerce.

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[1] This brief *amicus curiae* is filed with the written consent of the parties to this action pursuant to Supreme Court Rule 36.1. Statements of consent are on file with the Clerk of this Court.

The Chamber regularly advocates its members' views in court [2] and before administrative agencies on issues of national concern to the American business community. This representation constitutes a significant aspect of the Chamber's activities, and includes participation in agency rulemakings on a broad spectrum of business issues. The Chamber has submitted public comments to, *inter alia*, the Environmental Protection Agency, the Occupational Safety and Health Administration, the Internal Revenue Service, and the Department of Energy.[3] The Chamber believes that its comments play an important role in educating these agencies about the impact of a proposed rule on the business community. Unfortunately, the Chamber has been foreclosed in some instances from this participation when agencies characterize rules as "interpretative," and like the petitioner here, has initiated litigation contesting administrative action that was taken without the benefit of public notice and comment. *Chamber of Commerce of the United States* v. *OSHA*, 636 F.2d 464 (D.C. Cir. 1980).

This case presents this Court with two critical questions of administrative law that have far-reaching consequences for the entire regulated community. The label assigned to an administrative rule determines *whether* it

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[2] *See, e.g., Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, Nos. 83-1013, 83-1373, slip op. (U.S. Feb. 27, 1985); *Trans World Airlines* v. *Thurston*, 53 U.S.L.W. 4024 (U.S. Jan. 8, 1985); *Natural Resources Defense Council, Inc.* v. *EPA*, 595 F. Supp. 65 (D.D.C. 1984), *appeal docketed*, Nos. 84-5566-69 (D.C. Cir. 1984).

[3] *See, e.g.*, Comments of the Chamber of Commerce of the United States on *Proposed Regulations Relating to the Limitation on the Amount of Depreciation and Investment Tax Credit for Automobiles and the Limitation when Certain Property is Used for Personal Purposes* (December 21, 1984); *Advance Notice of Proposed Rulemaking*, 40 C.F.R. 765, *Formaldehyde: Determination of Significant Risk* (July 23, 1984).

will be reviewed by the public and *how* it will be reviewed by the courts. Only "interpretative" rules are exempt from the public notice and comment requirements of the Administrative Procedure Act. Only "legislative" rules require the highly deferential standard of judicial review mandated by this Court in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984).

In the decision below, the U.S. Court of Appeals for the District of Columbia Circuit upheld as "interpretative" an EPA rule that extended motor vehicle recall and repair liability under the Clean Air Act. In so doing, the court failed to apply the "substantial impact" test followed in four circuits for distinguishing between legislative and interpretative rules, and applied *Chevron's* highly deferential standard of judicial review.

The Chamber is concerned that this decision will adversely affect its ability to represent its members in future rulemakings. By ignoring the impact of a rule, the District of Columbia Circuit encourages administrative agencies to by-pass public review, and thereby avoid the kind of participation Congress intended to precede policy determinations that have a substantial impact on the rights and liabilities of the regulated community. The number of regulatory statutes with exclusive review in the District of Columbia Circuit underscores the importance of this issue.

As the principal voice of the American business community, the Chamber is well-suited to present the broad interest of the regulated community in this case. Without guidance from this Court on how to distinguish between legislative and interpretative rules, the regulated community runs the continued risk of being denied the opportunity to participate in agency decisionmaking because of wrongly assigned "interpretative" labels upheld under improper standards of judicial review.

Immediate review by this Court is required to resolve the conflict in the circuits, and to instruct the lower courts on the proper interpretation of *Chevron*. For these reasons, the Chamber respectfully submits its brief, and urges this Court to grant General Motors' Petition.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the District of Columbia Circuit upheld as "interpretative" an Environmental Protection Agency ("EPA") rule that extended General Motors' recall repair liability under the Clean Air Act beyond the statutory definition of a motor vehicle's useful life. The effect of the rule was to increase fourfold the number of vehicles to be repaired at the company's expense under threat of fines up to $10,000 per vehicle. By characterizing this rule as "interpretative," EPA foreclosed any public participation in the agency decision-making process, even though the rule critically affected the rights and liabilities of the entire motor vehicle industry.

This decision adds to the confusion among the courts of appeals on how to distinguish between legislative and interpretative rules. By rejecting the "substantial impact" test followed by the First, Second, Fifth and Eighth Circuits, the District of Columbia Circuit encourages regulatory agencies to engage in closed-door decision-making without regard to the effect of their actions on the regulated community.

This decision also misapplies the highly deferential standard of judicial review reserved for "legislative" rules by this Court in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984). The District of Columbia Circuit erred both in upholding EPA's "interpretative" label and in applying *Chevron's* lenient standard to a rule adopted without the benefit of public notice and comment.

This Court's guidance is needed to resolve the conflict in the circuits, establish a uniform test for distinguishing between legislative and interpretative rules, and instruct the lower courts on the proper interpretation of *Chevron*.

ARGUMENT

The characterization of a rule as "interpretative" or "legislative" has far-reaching implications for the regulated community. It determines whether affected parties may participate in agency decisions that have a substantial impact on their rights and liabilities. It also determines the amount of deference a court must give the rule once promulgated.

This distinction, fundamental to administrative law, is founded on the premise that only legislative rules are promulgated pursuant to a congressional delegation of authority. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301-302 (1979). In contrast, interpretative rules serve only to advise the public of agency policy on how it construes a statute or regulation. Hence, legislative rules are subject to the public notice and comment procedures of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553 (b), and bind the rights and obligations of the affected parties. Interpretative rules, on the other hand, are exempt from these procedural safeguards, 5 U.S.C. § 553 (b) (A), and have no legal force or effect.

Despite the serious consequences attached to the "interpretative" and "legislative" labels, nowhere in the APA are they defined. Lower courts attempting to define those terms and make the distinction have adopted a range of conflicting tests. As a result, efforts to determine whether a particular rule falls within the APA's interpretative rule exemption have left the lower courts "wandering lost in the Serbonian Bog." [4] Courts and commentators

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[4] *Jean* v. *Nelson*, 711 F.2d 1455, 1480 (11th Cir. 1983), *mooted prior to rehearing en banc*, 727 F.2d 957 (11th Cir. 1984).

have described this area as "enshrouded in considerable smog," [5] "not black and white," [6] "a morass," [7] "confusing," [8] and "difficult." [9]

Notwithstanding the confusion and conflicts among the lower courts, this Court has never articulated a test for determining whether a rule is interpretative or legislative. In fact, in *Chrysler*, this Court noted this absence, and stated that "authoritative sources essentially offer definitions [of the APA's interpretative rule exemption] by negative inference." 441 U.S. at 302. The lower courts bear this out by continuing to develop conflicting tests for characterizing administrative actions.

I. THIS COURT SHOULD ESTABLISH A UNIFORM TEST FOR DISTINGUISHING BETWEEN INTERPRETATIVE AND LEGISLATIVE RULES.

A. Conflicting Standards Divide the Circuits on the Characterization of Agency Rules.

Multiple tests for distinguishing between legislative and interpretative rules have emerged within the circuits. They focus in varying degrees on a number of different factors. These factors include "substantial impact," "binding norm," "intent of the agency" and whether the agency has made a "significant policy determination" in promulgating a rule. Immediate review by this Court is required to resolve these inconsistencies and

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[5] *Noel* v. *Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975), *cert. denied*, 423 U.S. 824 (1975).

[6] *United States Department of Labor* v. *Kast Metals Corp.*, 744 F.2d 1145, 1152 (5th Cir. 1984).

[7] *Jean* v. *Nelson*, 711 F.2d at 1480.

[8] 2 K. Davis, Administrative Law Treatise § 7.5 at p. 32 (2nd Ed. 1979).

[9] *Guardian Federal Savings and Loan Ass'n* v. *Federal Savings and Loan Insurance Corp.*, 589 F.2d 658, 665 (D.C. Cir. 1978).

establish a uniform test to ensure consistent compliance with the public notice and comment requirements of the APA.

1. *Substantial Impact*

The primary conflict in the circuits focuses on the extent to which the impact of a regulation is relevant to determining its character. The District of Columbia Circuit, joined by the Ninth and Eleventh Circuits, hold that the impact of a rule upon the affected parties is not a factor.[10] These circuits reject this test based on their interpretation of this Court's opinion in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).[11]

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[10] *American Postal Workers Union* v. *U.S. Postal Service*, 707 F.2d 548, 560 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1594 (1984) ("our decision that . . . [the rule] was a legislative rule was based not on the rule's impact but rather on the fact that it was promulgated pursuant to a specific delegation of legislative power in the governing statute"); *Rivera* v. *Becerra*, 714 F.2d 887, 891 (9th Cir. 1983), *cert. denied sub nom. International Union, United Auto., Aerospace and Agricultural Implement Workers* v. *Donovan*, 104 S. Ct. 1591 (1984) (rejecting the substantial impact test); *Jean* v. *Nelson*, 711 F.2d at 1480 ("We here conclude that the substantial impact test is insufficient to determine whether a rule is a general statement of policy").

[11] *Vermont Yankee* held that the APA established the maximum procedural requirements which Congress was willing to have the courts impose upon agency rulemakings. *Id.* at 524. Both the District of Columbia and Ninth Circuits hold that the language of *Vermont Yankee* proscribes courts from considering the substantial impact of a regulation, because such thoughts engraft judicial notions of proper procedures upon agencies beyond the requirements of the APA. *Cabais* v. *Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982); *Rivera* v. *Becerra*, 714 F.2d at 890-91. In contrast, the Fifth Circuit interprets *Vermont Yankee* to apply to the court's role once it has determined that a rule is legislative and thus subject to notice and comment procedures, and not to whether the APA mandates use of the statutory notice and comment procedures in the first place. *U.S. Department of Labor* v. *Kast Metals Corp.*, 744 F.2d at 1154 n.19.

Four other circuits do consider the impact of a regulation in determining its character. However, the weight they accord to it varies. The Second, Fifth and Eighth Circuits prescribe that when a proposed rule has a substantial impact, the parties affected are automatically entitled to notice and opportunity to comment.[12] The substantial impact test is the primary means by which these courts look beyond the agency's label to determine whether a rule is the type Congress thought appropriate for public participation. By contrast, the First Circuit holds that the fact that a rule has a substantial impact does not necessarily make the rule legislative, but is only one factor in determining whether notice and comment is required. *Levesque* v. *Block*, 723 F.2d 175, 182 (1st Cir. 1983).

2. *Binding Norm*

A second conflict has developed over the role of a rule's effect in determining its character. Frequently referred to as the "binding norm" test, the central inquiry is whether the rule binds the rights and obligations of the regulated parties. If the rule has no legal effect and imposes no new duties, it is interpretative. *Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844, 876 (D.C. Cir. 1979).

The District of Columbia and the Fourth Circuit follow this approach. *City of Alexandria* v. *Helms*, 728 F.2d 643, 647 (4th Cir. 1984); *Citizens to Save Spencer*

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[12] *Brown Express, Inc.* v. *United States*, 607 F.2d 695, 702 (5th Cir. 1979) ("Our inquiry, therefore, is not whether the rule is 'substantive' or 'procedural,' but rather whether the rule will have a 'substantial impact' on those regulated."); *American Bancorporation, Inc.* v. *Board of Governors of the Federal Reserve System*, 509 F.2d 29, 33 (8th Cir. 1974) ("To determine whether the amendment was substantive or interpretative, we must focus upon its impact on the banking industry regulated by the Board."); *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478, 482 (2d Cir. 1972) ("By virtue of this substantial impact . . . , notice and opportunity for comment by the public should first be provided.").

County v. *EPA*, 600 F.2d at 876. Two other circuits reject it. According to the First Circuit, the binding norm test is unhelpful because *all* rules are binding on the regulated parties. *Levesque* v. *Block*, 723 F.2d at 182. The Ninth Circuit states that the extent to which regulations are binding is only an effect of the distinction between legislative and interpretative rules, not a criterion of distinction. *Alcaraz* v. *Block*, 746 F.2d 593, 614 (9th Cir. 1984).

3. *Agency Intent*

The District of Columbia Circuit, along with the First, Ninth and Eleventh Circuits, focus on the intent of the agency in promulgating a rule.[13] These courts hold that where an agency has the power to promulgate both legislative and interpretative rules, the intent of the agency to promulgate one type of rule over the other determines in part its character.

4. *Significant Policy Determination*

Another factor considered by at least one circuit is whether the rule involves a significant policy determination. *First Bancorporation* v. *Board of Governors*, 728 F.2d 434 (10th Cir. 1984). Where an agency makes a significant policy determination, the resulting rule is legislative. *Id.* at 438.

B. A Uniform Standard Will Eliminate the Conflict in the Circuits and Ensure Compliance with the Notice and Comment Requirements.

Congress recognized that an agency's knowledge is rarely complete, and enacted the APA's notice and comment requirements to ensure that agencies are provided

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[13] *Levesque* v. *Block*, 723 F.2d at 182; *American Postal Workers Union* v. *U.S. Postal Service*, 707 F.2d at 558; *Louisiana-Pacific Corp.* v. *Block*, 694 F.2d 1205, 1209-10 (9th Cir. 1982); *American Trucking Ass'n* v. *United States*, 688 F.2d 1337, 1344 (11th Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 2458 (1984); *Chamber of Commerce of the United States* v. *OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980).

with relevant facts and information before they implement rules of general applicability. S. Doc. No. 248, 79th Cong., 2d Sess. 19-20 (1946). The lack of specific language in the APA regarding which rules are subject to these requirements has given rise to a body of case law articulating different criteria for characterizing agency actions. These criteria have been inconsistently applied, creating great conflict in the decisions of the circuits. Moreover, agency actions have been allowed to proceed without the public input contemplated by the APA. A single standard enunciated by this Court is needed to eliminate this confusion, and ensure that the procedures mandated by Congress are followed.

II. THE LOWER COURT ERRONEOUSLY CHARACTERIZED THIS RULE, AND THEN MISTAKENLY ACCORDED IT TOO MUCH DEFERENCE.

A. The Court Below Wrongly Characterized This Rule as Interpretative.

Without notice and comment, EPA adopted a "nationally applicable regulation" [14] which extended recall and repair liability under the Clean Air Act beyond the statutory definition of a motor vehicle's useful life. EPA's action increased by fourfold the number of vehicles to be repaired at General Motors' expense under threat of fines of up to $10,000 per vehicle. EPA characterized this rule as "interpretative," and thereby foreclosed any public participation in its decisionmaking process, even though the rule critically affected the rights and liabilities of the entire motor vehicle industry. This characterization was clearly erroneous.

EPA's recall and repair rule reflected significant policy determinations that Congress left for the agency to make, and created a substantial impact on the motor vehicle industry, imposing new rights and duties. The

[14] 45 Fed. Reg. 36,396 (1980).

lower court failed to give adequate weight to these factors, but concentrated instead on the agency's label and justification for the rule. Accordingly, the court erred in upholding EPA's characterization.

This rule reflected important policy determinations made by the agency on the question of whether a vehicle subject to recall notification must be repaired if it has passed its useful life. The Clean Air Act is silent on this issue, and as EPA stated, "[t]he legislative history of the Act offers little guidance." 45 Fed. Reg. 36,397 (1980). Thus, the rule was neither a restatement nor an explanation of Congress' intent.[15] With no actual congressional intent to draw on, the agency made policy-based determinations within gaps in the statute left by Congress. By choosing among alternative enforcement programs, EPA exercised legislative rulemaking authority. *See, Chevron,* 104 S. Ct. at 2782-83; *Chrysler Corp.* v. *Brown,* 441 U.S. at 316.

As noted by the petitioner, EPA's initial regulations implementing the recall and repair provisions were adopted by legislative rulemaking in 1974 after extensive public comment on their impact. Pet. at 20. The instant rule should have undergone the same public scrutiny and input, and the lower court should have accorded more weight to the fact that this rule embodied significant policy choices.

The lower court also failed to take into account the rule's substantial impact on the regulated community, an important factor in distinguishing between legislative and interpretative rules.[16] Rules of general applicability

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[15] This was an area, like that in *Chevron,* in which Congress "did not actually have an intent." 104 S. Ct. at 2783.

[16] *See, Chrysler Corp.* v. *Brown,* 441 U.S. at 302 (effect on individual rights is "an important touchstone" for distinguishing legislative rules); *Morton* v. *Ruiz,* 415 U.S. 199, 232 (1974) (describing a legislative rule as one "affecting individual rights and obligations").

which have a substantial impact on the regulated industry can only be promulgated after notice and opportunity for comment.[17]

The rule involved in this case will have a formidable effect on the obligations of manufacturers. The number of vehicles eligible for repair in each recall will increase substantially. Manufacturers may even be required to repair vehicles that conformed with all requirements throughout their useful lives, under threat of fines of up to $10,000 per vehicle. This burden will be particularly onerous in the event of recalls issued late in the life of a class. The impact of such a rule should be considered before the label "interpretative" is allowed to stand.

In holding that the agency's rule was interpretative, the lower court relied on its assertion that EPA's "*justification* for the rule is comprised of reasoned statutory interpretation, with reference to the language, purpose and legislative history of section 207(c)." Pet. App. at A-8 (emphasis added). Given the agency's description of the legislative history and its reliance on major policy determinations, this characterization of the agency's justification is highly suspect. In any event, agency justification for promulgating a rule should not be determinative of the nature of the rule produced.

The lower court also placed too much reliance on the label the agency attached to the rule. While this is a factor to be considered, an agency's own label is not dispositive. *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 416 (1942). Rather, "it is the substance of what the [agency] has purported to do and

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[17] *Pharmaceutical Manufacturers Ass'n* v. *Finch*, 307 F. Supp. 858, 863 (D. Del. 1970). *Accord, Daniel Freeman Memorial Hospital* v. *Schweiker*, 656 F.2d 473, 476-77 (9th Cir. 1981); *Anderson* v. *Butz*, 550 F.2d 459, 463 (9th Cir. 1977); *Pickus* v. *U.S. Board of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974); *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d at 482; *Texaco, Inc.* v. *FPC*, 412 F.2d 740, 744 (3d Cir. 1969).

has done which is decisive." *Id.* The lower court recited this principle, but went on to accord undue weight to the agency's label. *See*, Pet. App. at A-7, A-8. By promulgating this rule, EPA exercised legislative power, and was required to undergo the appropriate procedural prerequisites.

B. The Court Below Wrongly Applied *Chevron's* Highly Deferential Standard of Review to a Rule it Characterized as Interpretative.

The lower court relied on this Court's decision in *Chevron*, 104 S.Ct. 2778, for the standard of judicial review it applied to this administrative rule. This reliance was misplaced, and resulted in the lower court applying the highly deferential standard of review reserved for legislative rules to a rule it characterized as interpretative. This Court's guidance is needed to prevent further misconstruction and misapplication of the principles announced in *Chevron.*

Over the past two decades, the standard of review applied by this Court when examining administrative rules has varied substantially, depending upon the nature of the rule, its statutory basis, and its administrative history. Among other standards, this Court has accorded "substantial deference," [18] "due deference,[19] and "some deference," [20] to agency interpretations.

By comparison, this Court has repeatedly stated that a highly deferential standard of review is to be applied

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[18] *Securities Industry Ass'n* v. *Board of Governors*, 104 S. Ct. 2979, 2992 (1984).

[19] *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 517 n.13 (1981).

[20] *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979).

to "legislative" agency rules.[21] Just this Term, the Court applied this standard in *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, Nos. 83-1013 and 83-1373, slip op. (U.S. Feb. 27, 1985), when reviewing an EPA variance procedure promulgated pursuant to the public notice and comment requirements of the APA.

In *Chevron*, the Court once again set forth this highly deferential standard, stating that "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 104 S. Ct. at 2782.[22] They are upheld if they reflect "a reasonable choice within a gap left open by Congress." *Id.* at 2793.

Legislative rules are given such great deference because Congress delegated to the agency the task of accommodating conflicting policies and prescribing regulations that have the force of law. *Chevron*, 104 S. Ct. at 2783. Moreover, they are adopted after public participation through notice and comment.[23] Interpretative rules,

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[21] *See, e.g., United States* v. *Morton*, 104 S. Ct. 2769, 2776 (1984) (controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153-54 (1982) (subject to judicial review only to determine whether the administrator has exceeded his statutory authority or acted arbitrarily); *Herweg* v. *Ray*, 455 U.S. 265, 274 (1982) (entitled to more than mere deference or weight).

[22] This is akin to the standard enunciated in the Administrative Procedure Act for rules promulgated after notice and comment procedures. 5 U.S.C. § 706(2)(A).

[23] The importance of public input into the administrative process was recognized early on. *See*, S. Doc. 248 at 20 (Congress recognized that an agency's "knowledge is rarely complete, and it must learn the . . . viewpoints of those whom the regulation will affect . . . [Public] participation . . . in the rule-making process is essential in order to permit administrative agencies to inform themselves . . .").

adopted without this basis or input, are given less deference, and are subject to rigorous judicial scrutiny.[24]

EPA characterized the recall and repair rule as interpretative, EPA Brief at 41, and the Circuit Court agreed. Opinion and Order of D.C. Circuit En Banc dated September 7, 1984, Pet. App. at A-8. But despite its determination that the rule was interpretative, the court erroneously applied the lenient standard of review *Chevron* mandated for legislative rules. While holding that the rule was akin to a simple agency statement of what the statute means, the court went on to exercise "special deference" in light of its assessment that Congress had delegated to the agency "discretion in administering and designing an enforcement scheme." Pet. App. at A-23 n.16. This was plain error.

A rule cannot be characterized as interpretative, thus exempt from notice and comment requirements, and yet reviewed under the lenient standard reserved for legislative rules. Such characterization and subsequent lack of judicial review permits unconstrained agency action in areas of great public concern without public input. The Chamber and others who choose to comment on proposed agency actions should not be foreclosed from such opportunity without meaningful recourse.

The circuit courts have cited *Chevron* in support of a variety of standards and principles. While it is agreed that *Chevron* applies to legislative rules, it has been held both applicable [25] and inapplicable [26] to interpretative rules.

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[24] *See Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977) ("Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and . . . implement the statute . . . Such rules have the force and effect of law.' . . . By way of contrast, a court is not required to give effect to an interpretative regulation.") (citations omitted); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-42 (1976); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

[25] *Alcaraz* v. *Block*, 746 F.2d at 606.

[26] *Capitano* v. *Secretary of Health and Human Services*, 732 F.2d 1066, 1076 (2d Cir. 1984).

Chevron also has been cited, *inter alia*, for the proposition that reviewing courts must give "broad deference" to agencies' application of statutory criteria,[27] that reviewing courts are limited to "the narrow inquiry of whether [the] regulations are a 'reasonable' interpretation or explanation of the statute," [28] that reviewing courts are required to determine whether the agency considered the matter in a detailed and reasoned fashion,[29] and that reviewing courts are forbidden to "simply defer" to an agency's view of the law.[30]

Moreover, while it applied *Chevron* to this interpretative rule, the District of Columbia Circuit has varied in the amount of deference it has accorded other administrative actions, and the reasons for such deference.[31] The decision below adds further confusion to the issue. This is particularly troublesome in view of the number of

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[27] *Bethlehem Steel Corp.* v. *Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984).

[28] *Cospito* v. *Heckler*, 742 F.2d 72, 85 n.21 (3d Cir. 1984).

[29] *Rettig* v. *Pension Benefit Guaranty Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984).

[30] *New England Telephone & Telegraph Co.* v. *Public Utilities Commission of Maine*, 742 F.2d 1, 11 (1st Cir. 1984).

[31] *See, e.g., State of Montana* v. *Clark*, No. 83-1982, slip op. at 13 (D.C. Cir. Nov. 20, 1984); *EEOC* v. *Federal Labor Relations Authority*, 744 F.2d 842, 847 (D.C. Cir. 1984) (according "considerable deference" to agency interpretation); *American Friends Service Committee* v. *Webster*, 720 F.2d 29, 60 (D.C. Cir. 1983) (according "some deference" to the agency interpretation); *Planned Parenthood Federation of America* v. *Heckler*, 712 F.2d 650, 655 (D.C. Cir. 1983) ("the deference accorded does vary from case to case, and under certain circumstances can dissipate altogether"); *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413, 1422-23 (D.C. Cir. 1983) (courts accord "only limited deference" to an agency's interpretation of its own governing statute); *National Wildlife Federation* v. *Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982) (according "great deference" to the agency interpretation).

statutes providing for exclusive review in the District of Columbia Circuit. The Chamber asks this Court to address this issue and clarify that the highly deferential standard of review it articulated in *Chevron* applies only to legislative rules, and that interpretative rules are to be accorded more rigorous judicial scrutiny.

CONCLUSION

For the reasons stated above, the Chamber respectfully urges this Court to grant the General Motors' Petition for a Writ of Certiorari.

Respectfully submitted,

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